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January 24, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20544

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: CC Docket No. 95-72, End User Common Line Charges,
BOC Non-Traffic Sensitive Data Submissions

Dear Mr. Caton:

On December 8, 1995, MCI sent a letter to the Commission with regard to the above referenced proceeding. In its letter MCI argues that BellSouth has failed to comply with the Commission's request to provide cost data on ISDN services. MCI cites BellSouth's request for confidential treatment of this data as an example of BellSouth's noncompliance and of its increasing disregard for Commission guidelines.

The Commission's request for data was made by letter to each Bell Operating Company ("BOC") on September 29, 1995. The Commission requested that each BOC submit additional information regarding nontraffic sensitive costs ("NTS") of the single and multichannel services they offer. The Commission requested this information to "enable [them] to issue promptly a decision in a rulemaking proceeding concerning the appropriate assessment of Subscriber Line Charges ("SLCs") on derived channel services such as ISDN." In an effort to aid the Commission in resolving this issue, BellSouth voluntarily submitted its cost data in response to that request with the understanding that its data would be kept confidential.

Thus, BellSouth has fully cooperated with the Commission by providing it with the requested data. BellSouth owes no similar duty to provide MCI access to its confidential business data nor does the Commission have such a duty. As BellSouth stated in its letter of October 18, 1995, Exemption 4 of the Freedom of Information Act ("FOIA") protects from public disclosure trade secrets and commercial or financial information. BellSouth's cost of providing exchange services in general, and ISDN in particular fall within this category. In addition, no other common carriers are subject to

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having their sensitive confidential business information exposed and it would be clearly inappropriate for the Commission to single out BOCs for such business risks.

In its letter, MCI also disputes the confidential nature of the information provided by BellSouth and argues that BellSouth has failed to demonstrate the level of substantial harm that must be shown in order to receive grant of confidential cover. MCI's application of the standards governing nondisclosure however, are incorrect.

Commercial or financial information that is required to be filed with a federal agency is considered confidential under Exemption 4 if disclosure of such information would be "(1) likely to impair the government's ability to obtain necessary information in the future, (2) cause substantial competitive harm, or (3) result in harm to the effectiveness of agency programs."¹ BellSouth has already demonstrated in its November 9, 1995 letter to the Commission that "if the Commission were to release the information, such action would chill BellSouth's willingness to participate in certain rulemakings and as a result impair the Commission's ability to obtain information. BellSouth has also shown that release of cost data such as this could cause substantial competitive harm. Parties requesting confidentiality for information are not required to demonstrate actual or objective proof of competitive harm as MCI professes.

Moreover, as the D.C. Circuit determined in Critical Mass Energy Project v. NRC,² and the Commission recognizes³, a different standard applies where information is submitted voluntarily. In a rulemaking proceeding such as this, the Commission "affords interested persons the opportunity to participate through submissions of written data, views or arguments."⁴ Financial or commercial information provided to the Government on a voluntary basis is "confidential for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."⁵ BellSouth does not customarily release its cost data for public inspection. BellSouth did voluntarily submit this data in the context of a rulemaking proceeding with the understanding that it would not be disclosed.

¹ See, In the Matter of Southwestern Bell Telephone Tariff F.C.C. No. 73, Transmittal No. 2438, Order, Adopted June 7, 1995.

² Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992).

³ Letter from Regina M. Keeney, Chief, Common Carrier Bureau, to Thomas J. Pajda, Esq., Southwestern Bell Telephone Company, DA 95-2395, dated November 28, 1995 at n. 3.

⁴ 47 CFR Section 1.415(a).

⁵ Critical Mass Energy at 879.

Thus, the Commission should disregard MCI's requests to publicly disclose BellSouth's data. BellSouth's interest in maintaining the confidentiality of the data submitted is paramount. If the Commission will not honor BellSouth's request, it should return the data to BellSouth and disregard it in its determination of any rule.

Very Truly Yours,

Richard M Sbaratta BwK

Richard M. Sbaratta

cc: Regina M. Keeney
James D. Schlichting